

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes and regulations involved.....	2
Statement.....	5
Argument.....	8
Conclusion.....	10

CITATIONS

Cases:

<i>Boston Elevated R. Co. v. Malley</i> , 24 F. 2d 758.....	8
<i>Haggar Co. v. Helvering</i> , 308 U. S. 339.....	9
<i>Nicholas v. Colorado Fuel & Iron Corp.</i> , 112 F. 2d 858.....	9
<i>United States v. Whitridge</i> , 231 U. S. 144.....	8, 9

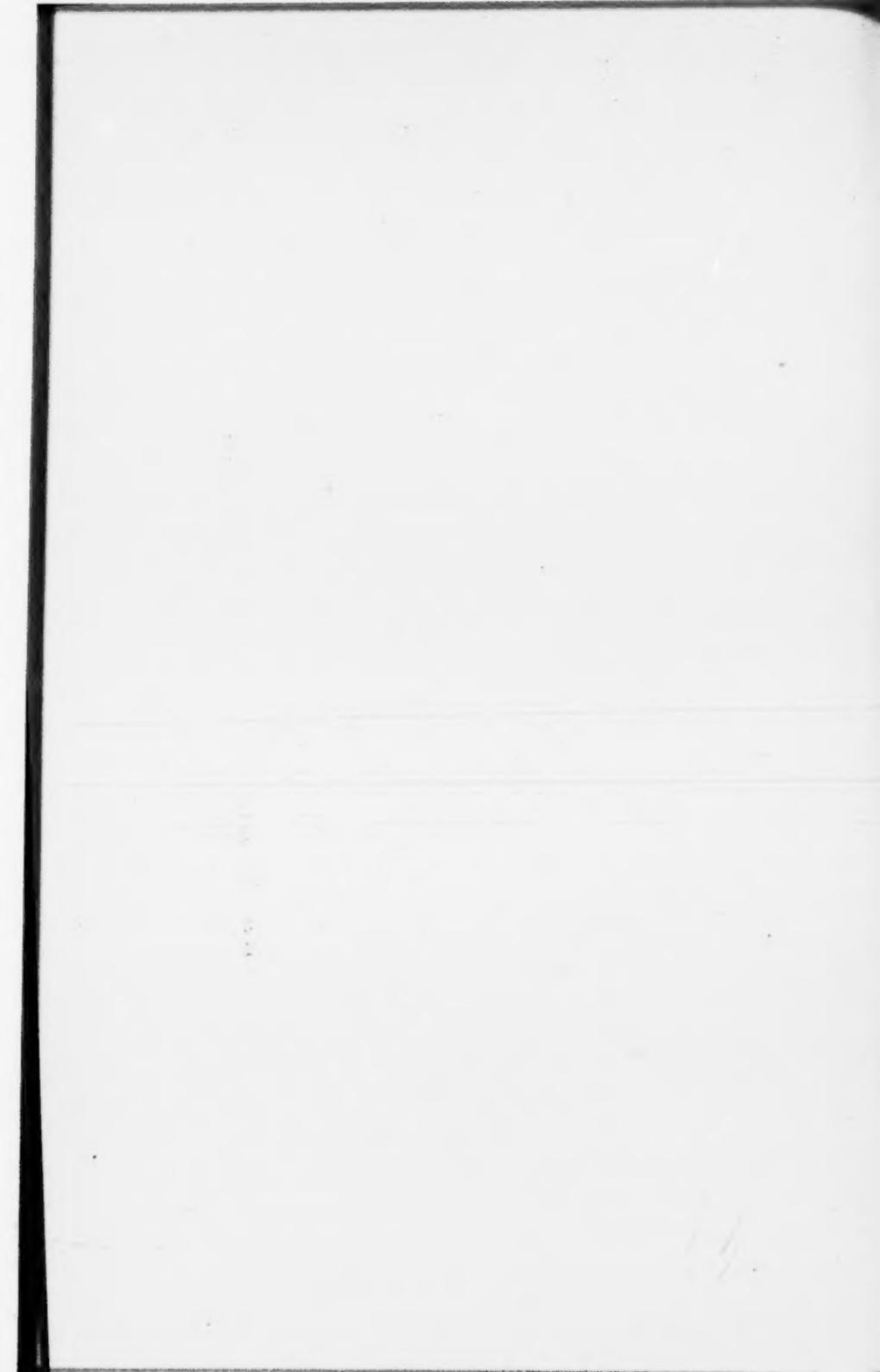
Statutes:

Revenue Act of 1935, c. 829, 49 Stat. 1014, Sec. 105, as amended.....	2
Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 52.....	2

Miscellaneous:

G. C. M. 21208, 1939-1 Cum. Bull. 343.....	10
Treasury Regulations 64:	
Art. 35.....	3
Art. 42.....	4

(I)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 835

UNITED SHIPYARDS, INC., PETITIONER

v.

JANE M. HOEY, AS EXECUTRIX OF THE ESTATE OF
JAMES J. HOEY, DECEASED

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 11-13) is not reported. The opinion of the Circuit Court of Appeals (R. 33-38) is reported in 131 F. 2d 525.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 18, 1942 (R. 40). Petition for rehearing was denied December 18, 1942 (R. 39). The petition for a writ of certiorari was filed March 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a debtor in possession in proceedings for reorganization under Section 77B of the Bankruptcy Act is "doing business" within the meaning of Section 105 of the Revenue Act of 1935, as amended, and therefore subject to the capital stock tax.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 105. CAPITAL STOCK TAX.

(a) [as amended by Section 401 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648.] For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of \$1 for each \$1,000 of the adjusted declared value of its capital stock.

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 52. CORPORATION RETURNS.

Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe. The return shall be sworn to by the president, vice president, or other

principal officer and by the treasurer, assistant treasurer, or chief accounting officer. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Treasury Regulations 64 (1936 ed.):

ART. 35. *Return by custodian.*—For the first year in which a corporation is subject to the tax the responsible officers are required under the law to execute and file the return. The duty of making the original declaration of value is imposed upon them and, unless they fail to do so, no one else may assume this obligation. In the event of such failure the Commissioner, collector, or deputy collector is authorized by law to make a return. (See second paragraph of article 37.) If, at the close of the taxable year, all of the property of a corporation is in the custody of and being administered by a receiver or a trustee in bankruptcy, or is in the custody of a Federal or State officer pending the appointment of a receiver or trustee in bankruptcy, there shall be attached to the return

a statement showing the date on which the property was placed in the custody of such officer and whether his custody has been continuous since that date. However, for any taxable year subsequent to the first, the adjusted declared value must be computed by starting with the original declared value as a base and making the definite adjustments required by the statute. Therefore, if at the time a return is required to be filed for such subsequent taxable year all of the property of a corporation is in the custody of and being administered by such official, he should prepare and file the return showing the required statutory adjustments from the records in his possession. If, during any entire year ending June 30, all of the property of a corporation is in the hands of such public official, the corporation is not subject to the tax for such year, but in order that its exempt status may be made known to the Commissioner such custodian shall file with the collector of internal revenue an information return on Form 707, attaching thereto an affidavit showing the date on which the property came into his custody and the fact that his custody was continuous throughout such entire year.

ART. 42. *Doing business.*—The term “business” is very comprehensive and embraces whatever occupies the time, attention, or labor of men for profit. Accordingly, regardless of the nature of its activities, any corporation organized for profit

and carrying out the purpose of its organization is doing business within the meaning of the Act. Similarly, even if not organized for profit, any corporation which nevertheless engages in activities ordinarily carried on for profit is also doing business. It is immaterial whether the activities result in a profit or a loss, whether the corporation has been successful in its enterprise, or that because of unfavorable business conditions, no operations are carried on for a particular period. No particular amount of business need be done, nor is it necessary that the business be continuous throughout the taxable year.

The case is exceptional in which the activities of a corporation organized for profit do not amount to doing business within the meaning of the Act. Such a case is generally limited to one in which the corporation is not pursuing the ends for which organized, i. e., profit.

STATEMENT

The taxpayer is a New York corporation organized December 14, 1928, under the name of United Dry Docks, Incorporated (R. 16). On May 5, 1936, its name was changed to United Shipyards, Inc. (R. 16).

On July 23, 1934, the taxpayer filed a petition for reorganization under Section 77B of the Bankruptcy Act (R. 19). On the same date, an order was entered approving the petition as filed and continuing the debtor temporarily in possession

of its property and estate (R. 19). This order provided, in part, as follows (R. 19-20) :

Ordered, Adjudged and Decreed: * * *

3. That this Court during the pendency of the proceeding under said Section 77-B hereby assumes and shall have exclusive jurisdiction of the Debtor and its property wherever located for the purposes of said section and that this Court shall have and may exercise all the powers not inconsistent with said section, which a Federal court would have, had it appointed a Receiver in equity of the property of the Debtor by reason of its inability to pay its debts as they mature;

4. That the Debtor be and it hereby is authorized and directed pending the further order of this Court in the premises and subject at all times to the control of this Court and to such limitations, terms and conditions as are herein and may from time to time be imposed and prescribed by this Court temporarily to continue in the possession of the estate, property and business of the Debtor and to manage, maintain and operate and keep in proper condition and repair the property of the Debtor and to operate the business of the Debtor wheresoever situated, whether in this State, judicial district or elsewhere, and that to such end and to the end that the business of the Debtor and its subsidiary corporations may be continued, operated and managed as an entirety according to the customary and usual

manner of conducting similar businesses the Debtor is hereby authorized and empowered without in any manner restricting or modifying the powers elsewhere granted to the Debtor hereby or which the Debtor might otherwise have by law: * * *

(1) to have and to exercise, consistently with the provisions of said Section 77-B, all the powers of trustees appointed pursuant to Sections 44 and 77-B of the Bankruptcy Act and the same powers as those exercised by a Receiver in Equity to the extent consistent with said Section 77-B.

On August 14, 1934, an order was entered in the reorganization proceedings making permanent the order of July 23, 1934, and continuing the debtor in possession of its property and reserved to the court supervision and control over the debtor and its property (R. 20). During the entire tax year, ending June 30, 1936, the taxpayer corporation carried on its regular business of building and repairing ships, subject to the supervision of the court (R. 11, 38).

A plan of reorganization was later effected and on March 5, 1937, a final decree was entered discharging the debtor from its debts and liabilities and terminating the reorganization proceedings (R. 20).

On September 29, 1936, the taxpayer filed a capital stock tax return for the year July 1, 1935, to June 30, 1936, with a declared capital stock value of \$10,000,000, and paid capital stock taxes

in the amount of \$10,000 and interest in the amount of \$100 (R. 17).

Following rejection of its claim for refund, taxpayer brought this action. The District Court concluded that (R. 22) taxpayer was not carrying on business during the year ending June 30, 1936, and was not subject to the capital stock tax. The Circuit Court of Appeals reversed (R. 40).

ARGUMENT

During the entire tax year ending June 30, 1936, the taxpayer corporation carried on its regular business of building and repairing ships (R. 11, 38). The fact that it was operating the business under the supervision of the court, as a debtor in possession under Section 77B of the Bankruptcy Act, does not preclude the applicability of the capital stock tax.¹

The taxpayer here apparently concedes (Br. 22), that its activities constituted doing business (as indeed it must in the light of the broad scope of its activities), but asserts that the test here is "who was doing the business." (Br. 22.) In *United States v. Whitridge*, 231 U. S. 144, an individual independent receiver, appointed by the court, was in charge of the company and the tax was held inapplicable on the ground that the business was not conducted through the medium of a

¹ The imposition of the capital stock tax upon the taxpayer was upheld in *Boston Elevated R. Co. v. Malley*, 24 F. 2d 758 (Mass.), though it was operating the business under the supervision of public trustees.

corporate organization. But here the taxpayer corporation continued the operation of its own business, subject only to the supervision of the court for the protection of creditors.²

The taxpayer asserts (Pet. 5-6) that no distinction should be made between the status of a debtor in possession under Section 77B and that of an outside trustee or receiver appointed by the court, as in the *Whitridge* case. Cases are cited (Pet. 6-9) for the proposition that the debtor in possession, like the outside trustee, holds the property in trust for the benefit of the creditors.³ Those cases were concerned primarily with the basic rights of the parties with respect to the assets and earnings of the debtor corporation. The fact that a corporate debtor in possession is regarded as holding the assets in trust for its creditors does not mean that it is not doing business in a corporate capacity within the meaning of the capital stock tax statute. Two of the four

² The capital stock tax is integrated with the excess profits tax (Section 106 of the Revenue Act of 1935), and since the company here was clearly subject to that tax (Section 52, *supra*), it seems plain that it was also subject to the capital stock tax. Cf. *Haggar Co. v. Helvering*, 308 U. S. 389, 391-392.

³ *Nicholas v. Colorado Fuel & Iron Corp.*, 112 F. 2d 858 (C. C. A. 10th), cited by the taxpayer (Pet. 8), was the only one of these cases dealing with capital stock tax; it is clearly distinguishable, being similar to the *Whitridge* case. There an outside trustee operated the business throughout the reorganization proceedings. The question presented was whether the successor corporation took over before or after the end of the taxable year.

cases here cited by the taxpayer were former decisions of the court below and were properly distinguished (R. 35-37) as merely holding that (R. 37) "for some purposes" a debtor in possession is analogous to a trustee.

The court below correctly concluded that (R. 37) the corporate debtor here was still carrying on or doing business, although the manner in which it could operate was restricted by trustee obligations imposed under the Bankruptcy Act. The legislative history of Section 77-B shows (see G. C. M. 21208, 1939-1 Cum. Bull. 343) that the corporation was to continue its normal business functions, subject to the supervision of the court, without being ousted from the management of its business as in the *Whitridge* case.

CONCLUSION

There is no conflict of decisions. The decision below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,

Solicitor General.

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

J. LOUIS MONARCH,

JOSEPH M. JONES,

Special Assistants to the Attorney General.

APRIL 1943.

